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Supreme Court of the United States

October Term, 1956

No. 354

MICHIGAN CORPORATION AND SECURITIES COMMISSION AND MICHIGAN CORPORATION TAX APPEAL BOARD, *Petitioners*

v.

PANHANDLE EASTERN PIPE LINE COMPANY, *Respondent*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

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OPINIONS BELOW

The opinion of the Supreme Court of the state of Michigan is reported at 346 Mich. 50, 77 N.W.2d 249. The opinion of the Circuit Court for the county of Ingham is unreported and is printed in the Record, page 55.[1] The decision of the Michigan Corporation Tax Appeal Board is also unreported and is printed in the Record, page 40.

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[1] References to the record filed with the petition are indicated as "(R.)."

JURISDICTION

Jurisdiction is adequately alleged in the petition.

QUESTIONS PRESENTED

In the view of the respondent, the questions presented are:

1. Whether in the circumstances of this case the Supreme Court of Michigan correctly required the petitioner to eliminate respondent's gross receipts from interstate commerce from the factors utilized in determining the portion of respondent's capital and surplus upon which a franchise or privilege tax was computed?

2. More specifically, the question is whether, under the Commerce Clause and the Due Process Clause of the United States Constitution, 50% of the receipts from the sale of natural gas transported by the respondent in interstate commerce and delivered to its customers in the state of Michigan can be used with other factors for the purpose of measuring the portion of respondent's capital stock and surplus that is taxable for franchise tax purposes, where the natural gas so transported is delivered directly to wholesale customers without having come to rest and without having been stored or processed in any way in the state of Michigan, and where (a) 7.0740% of respondent's pipeline mileage lies in Michigan, (b) 5.0304% of its property is in Michigan, (c) 3.3512% of its payroll is in Michigan, (d) 2.0360% of its operating expenses are incurred in Michigan, (e) 2.1688% of its receipts are from intrastate sales in Michigan, (f) 5.9282% of its receipts from sales in Michigan are from intrastate sales, and (g) the receipts from in-

terstate sales are not related to or the end result of any intrastate activities of the respondent in Michigan?

STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

The statute involved is Public Acts Michigan 1952, No. 183, Sections 4, 5, and 5e, Mich. Stat. Ann., 1953 Cum. Supp. §§21.205, 21.208, which have been printed in "Appendix 'C'" to the petition (App. 8a-14a).[2] The relevant provisions of the United States Constitution are Art. I, §8, and the Amend. XIV, §1. These provisions are likewise printed in "Appendix 'C'" to the petition (App. 14a).

The statute, §4 (App. 8a), imposes an annual franchise tax for the privilege of doing business in Michigan. Under § 5 (App. 10a) of the statute, a formula is provided to determine what percentage of a corporation's capital and surplus is attributable to the state of Michigan. The formula is comprised of three factors, separately determined and then averaged. These factors are: (1) the ratio of Michigan property to total property everywhere; (2) the ratio of Michigan payrolls to total payrolls everywhere; and (3) the ratio of Michigan receipts to total receipts. Michigan receipts are defined to include (a) the total receipts from intrastate sales plus (b) 50% of the receipts derived from sales in Michigan of goods transported into the state plus (c) 50% of the receipts from sales made out of the state of the property shipped from Michigan.

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[2] References to the appendix to the petition for a writ of certiorari herein are indicated as "(App.)"

The statute further provides in §5e (App. 13a) that if an application of the allocation factor determined under the §5 formula "* * * *does not properly reflect the activity, business, receipts and capital of a taxpayer reasonably attributable to the state, the commission shall adjust"[3] the result by, among other things, "*excluding* 1 or more of the factors" used in the formula or "*including* 1 or more other factors" or applying "any other similar method calculated to effect a fair and proper allocation according to the receipts, activity, business and capital reasonably attributable to this state."

COUNTERSTATEMENT OF THE CASE

At all times throughout this proceeding, respondent has acknowledged liability to the state of Michigan for a franchise tax. It has contended only that one part of the three-part apportionment formula provided by §5 was inappropriate as applied to respondent's business and that this part of the formula should be adjusted under §5e, or, in the alternative, excluded from the measure of the tax. The court below has not held that respondent is not subject to the franchise tax, but merely agreed with respondent that the state taxing authorities, petitioners here, should apply §5e in the particular circumstances of this case.

Respondent invoked §5e by its original filing with the Commission for the year 1952 and in its appeal to the Appeal Board (R. 1-7, 8-27). In filing its franchise tax return with the state of Michigan, it maintained that strict adherence to §5 was inappropriate and computed the tax by a different formula under

[3] Unless otherwise indicated, emphasis has been added throughout.

§5e. It included in its computations additional factors, including pipeline mileage or traffic units and operating expenses (*ibid*). Subsequently, it made several other proposals as to how the fee might be computed, taking the position that the use of the §5 formula did not properly reflect the portion of the capital and surplus allocable to the state (R. 14, 18, *et seq.*).

The petitioners, the Commission and the Appeal Board, refused to apply §5e and insisted upon strict adherence to the formula prescribed by §5 in the calculation of respondent's franchise fee. Respondent appealed, and both courts below, the Circuit Court for the county of Ingham and the Supreme Court of Michigan, held that petitioners were required, with respect to the gross receipts factor, to make an adjustment under §5e by excluding interstate receipts rather than rigidly applying §5. Thus, the Michigan Supreme Court stated (App. 7a-8a):

> "In our opinion it is clear that the formula used by the commission includes receipts from a business not related to [respondent's] intrastate business * * *. We hold that the * * * [petitioners] erred in determining that §5 * * * was applicable in determining the annual privilege fee of [respondent] for the year 1952, rather than and without adjustment pursuant to §5e of said act."

In the courts below, respondent urged that the use of the §5 formula, as opposed to other possible formulae pursuant to the provisions of §5e, contravened the Commerce Clause and Due Process Clause [4] of the United

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[4] The petition (5) suggests that only the Commerce Clause was involved. However, in the Appendix to the petition, petitioners also quote the Due Process Clause of the Fourteenth Amendment (App. 14) as being involved. No specific argument on this point is

States Constitution. The Michigan Supreme Court held (App. 7a) that the use of the §5 formula

> "* * * is arbitrary and imposes an unjust burden upon interstate commerce."

Respondent will not argue (although the matter might be debated) that the decision below was not based upon the Federal Constitution. The court below held that none of respondent's interstate receipts could be used as a measure of its intrastate activity in the state; and it appears to have done so upon the ground that the action of petitioners was prohibited by the decisions of this Court construing the Federal Constitution.

The petitioners take the general position that:

> "* * * the State is not prohibited by the Commerce Clause from including receipts or property derived from or used in interstate commerce in the factors used to measure * * * the reasonable value of the privilege granted Panhandle, *permission to do and doing an intrastate business within the State*" (Pet. 14).

Respondent has no quarrel with this statement as a general proposition, where interstate receipts are related to or are a reasonable measure of an intrastate activity; but, it is the *intrastate privilege only* which is to be measured. Neither here nor below has there been any attempt to show that the inclusion of interstate receipts in the formula prescribed by §5 of the

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required. Respondent reserves the right to argue that the Due Process Clause prohibits the use of the §5 formula if a writ of certiorari is granted. See, for example, *Hans Rees' Sons, Inc.* v. *North Carolina ex rel. Maxwell*, 283 U.S. 123, 132-3.

Michigan statute measures the reasonable value of respondent's privilege of doing an *intrastate* business.

Whether, and the extent to which, gross receipts from interstate commerce may be used as a measure of an intrastate privilege must depend upon the facts of each case. In this case the Michigan courts have held that the use of the receipts factor contained in §5 was arbitrary under the facts presented and constituted an undue burden on respondent's interstate activities. Petitioners have made no attempt to set out the facts regarding respondent's activities upon which the court below concluded that the allocation formula, as applied, was unconstitutional. These facts demonstrate that the Michigan courts had a reasonable and compelling basis for holding that the use of the §5 formula did not properly measure respondent's intrastate activities. We review the facts briefly.

Respondent, a Delaware corporation, is a natural gas company subject to the provisions of the Natural Gas Act, 15 U.S.C. §717 *et seq.*, engaged in the business of transporting and selling natural gas in interstate commerce (R. 35). As such, it transports and sells natural gas by means of a pipeline extending from Texas through Oklahoma, Kansas, Missouri, Illinois, Indiana, Ohio, and Michigan (see map at last page of record). In the first three of these states, it produces and purchases large volumes of natural gas for interstate transmission and sale through and in various states. In 1952, the year in question, respondent also produced a very small quantity of gas in the state of Michigan. No gas was purchased in Michigan, and all of that produced there was sold in Michigan (R. 35, 38).

Altogether, respondent owned and operated 3,974.55 miles of pipeline in 1952, of which 281.16 miles or 7.0740% were located in Michigan (R. 37, 38). Out of all the miles of pipeline in Michigan, 11.4 miles or 4.07% were used both for gas produced in Michigan and gas produced and purchased elsewhere and transported into Michigan (R. 37-8). The remaining 269.76 miles of pipeline in Michigan (R. 37) were used exclusively for the interstate transportation and sale of gas produced in and transported through other states (R. 36). 5.0304% of respondent's property was located in Michigan in the year in question (R. 36).

Of respondent's total payroll, 3.3512% was paid in Michigan, and 2.0360% of its total operating expenses were incurred in Michigan (R. 36). For gas produced and sold in Michigan, respondent received 2.1688% of its total receipts everywhere (R. 37). 94.0718% of its receipts from sales in Michigan were from gas produced or purchased elsewhere and transported in interstate commerce through a pipeline crossing seven other states. These latter sales accounted for 34.4161% of respondent's total receipts from all sources including Michigan (R. 37).

With the exception of the gas produced in Michigan, which is clearly sold in intrastate commerce, all of the gas sold by respondent in the state moves in a continuous uninterrupted stream from the fields in the southwest, through as many as seven other states, to the point of delivery. There is no pause, no transfer, no storage of gas in Michigan (R. 33). The gas produced in Michigan is sold in Michigan to one customer, Consumers Power Company (R. 33).

The sale of the gas produced in Michigan is in no way dependent upon the interstate business; and the

interstate sale of gas is not related in any way to the intrastate sale. The Circuit Court found that respondent "* * * could discontinue [its] intrastate business without withdrawing from the interstate business" (App. 5a, R. 58). The court below found that 94.0718% of respondent's sales of gas in Michigan were sales in interstate commerce through interstate pipelines (App. 6a). It also indicated that respondent's intrastate business in Michigan is insignificant in comparison with its purely interstate business (App. 7a). Moreover, the court found that respondent's sales and facilities used in its intrastate business were readily ascertainable and in no way related to the interstate business. It said (App. 7a):

> "In the case at bar the major part of [respondent's] business is interstate business, completely severable and unrelated to its intrastate business. * * * In our opinion it is clear that the formula used by the commission includes receipts from a business not related to [respondent's] intrastate business * * *."

Petitioners, notwithstanding the uncontroverted facts and without even challenging the facts or the courts' findings of fact, appear to take the position that the sales made by respondent in Michigan of gas piped through many other states are in fact intrastate sales or involve substantial intrastate activity (Pet. 7-9). They state, for example, that the gas sold in Michigan is "severed" from the main line and that many lateral lines run "wholly intrastate." This is contrary to the fact and the conclusion of fact by both Michigan courts. These exact claims were advanced there and found no support. The gas is transported from Texas in a continuous uninterrupted flow to the point of sale in Michigan (see map at last page of

record). There is no pause, no transfer, no interruption, no storage of gas in Michigan (R. 33).[5]

There is no warrant for an attempted distinction between main lines and laterals, nor is there any basis for asserting that laterals run wholly intrastate, severed from the main line. A lateral is simply a somewhat smaller pipe used as a branch or continuation of a main line because it would be uneconomical to use larger pipes to carry smaller quantities of gas. Some of the gas brought into Michigan by respondent is sold from large or main lines to distributors who are directly adjacent to that line; but, because the volumes to be carried decrease as deliveries are made, the large line is reduced in size at various points, or, because the distributing companies purchasing the gas are located in scattered areas away from the main line, laterals are used to deliver gas to them. The gas moves without pause or storage directly from the main lines into the laterals and thence to the customers. This Court has specifically passed upon the transportation and sale of natural gas through laterals and determined that such transportation and sale was interstate commerce. *Panhandle Eastern Pipe Line Co.* v. *Public Serv. Com.*, 332 U.S. 507, 512-13; *Illinois Natural Gas Co.* v. *Central Ill. Pub. Serv. Co.*, 314 U.S. 498, 503-4.

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[5] Some questions asked by petitioners' counsel during the hearing before the Commission used the terms "severance" and "severed," but it is not clear just what is meant. Respondent's witness did not in any manner so testify (R. 32-3).

ARGUMENT

As in the court below, the petitioners ask this Court to consider two equally unsupportable arguments, which are fused and not defined, but basic to the petition.

The first is that respondent's deliveries and sales in Michigan of gas transported from other states were really intrastate, not interstate. Petitioners refer to respondent's "theory" (Pet. 9) that such sales were interstate sales and ask this Court to consider that "many lateral lines run *wholly intrastate*, severed from the main pipelines coming up from Texas." As we have shown above, this question of fact has been properly determined by the courts below, and in a manner consistent with this Court's decisions on the precise point in *Panhandle Eastern Pipe Line Co.* v. *Pub. Serv. Com.* and *Illinois Natural Gas Co.* v. *Central Ill. Pub. Serv. Co.*, both *supra*. It is also in accord with the decision in *Missouri ex rel. Barrett* v. *Kansas Natural Gas Co.*, 265 U. S. 298, 307, that

> "Transportation of gas from one state to another is interstate commerce; and the sale and delivery of it to the local distributing companies is a part of such commerce."[6]

There is consequently no substantial basis for requesting a review of this question as determined below.[7]

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[6] See also *Joseph* v. *Carter & Weeks Stevedoring Co.*, 330 U.S. 422; *Puget Sound Stevedoring Co.* v. *State Tax Commission*, 302 U.S. 90.

[7] Petitioner cites *Panhandle Eastern Pipe Line Co.* v. *Michigan Pub. Serv. Com.*, 341 U.S. 329 (Pet. 17) for the proposition that respondent's interstate sales are "local in aspect." That case is not germane in any respect, the question being whether the Mich-

The second argument is that the Commerce Clause does not prohibit the state of Michigan from including interstate receipts in measuring the value of the privilege of doing intrastate business (Pet. 14). If petitioners were correct in their position that the sales and deliveries in question were not interstate sales, but were intrastate because made through laterals, or if these sales were dependent upon or inseparable from respondent's small intrastate business, a different question would be presented. But, on the record and the opinion of the court below, the intrastate business privilege to respondent by Michigan is only 6% of its total sales in Michigan, involves only 4% of its pipelines in Michigan, and is so unrelated to its interstate business that it not only is separable, but it could be discontinued without affecting the interstate business (App. 5a). Consequently, the question presented to the court below was whether the small, severable local activity would justify the arbitrary inclusion of 50% of receipts from interstate sales in the measure of the tax, *in addition* to receipts from the local business.

That court's decision of the question is in accord with the decisions of this Court. The law with respect to a state franchise or privilege tax upon interstate commerce has been clear for many years. A state may not tax the privilege of engaging in interstate commerce, and when a corporation engages in both interstate and intrastate commerce, the state may not enhance its tax upon the intrastate commerce by refer-

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igan Public Service Commission had regulatory jurisdiction over a certain kind of sale of natural gas. While the Court held that the Commission did have jurisdiction, it also held that the sale involved "* * * is clearly interstate commerce" (341 U.S. at 333).

ence to interstate commerce which is separable from and independent of the intrastate commerce.[8] The entire local business of respondent is sufficiently unrelated to its interstate business that Michigan may tax it freely. But the sale of gas brought in from other states is an integral part of interstate commerce and not subject to the privilege fee exaction, directly or indirectly. In the circumstances of this case, including gross receipts from purely interstate sales in the allocation formula would require respondent to pay for the privilege of engaging in the interstate transportation and sale of natural gas.

In *East Ohio Gas Co.* v. *Tax Commission of Ohio*, 283 U.S. 465, 470, the Court had before it an excise or franchise tax upon the privilege of carrying on the sale of natural gas in Ohio. The Court said, on the general proposition of privilege taxes:

> "* * * *It is elementary that a state can neither lay a tax on the act of engaging in interstate commerce nor on gross receipts therefrom.* * * * And, while a state may require payment of an occupation tax by one engaged in both intra-

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[8] *Railway Express Agency, Inc.* v. *Virginia*, 347 U.S. 359; *Michigan-Wisconsin Pipe Line Co.* v. *Calvert, infra; Spector Motor Service, Inc.* v. *O'Connor*, 340 U.S. 602; *Gwin, White & Prince* v. *Henneford*, 305 U.S. 434, 438-9, "* * * state taxation, whatever its form, is precluded if it * * * undertakes to lay a privilege tax measured by gross receipts derived from activities in such commerce which extend beyond the territorial limits of the taxing state." See *Leloup* v. *Port of Mobile*, 127 U.S. 640; *Crutcher* v. *Kentucky*, 141 U.S. 47; *Alpha Portland Cement Co.* v. *Massachusetts*, 268 U.S. 203; *Cudahy Packing Co.* v. *Hinkle*, 278 U.S. 460; *Anglo-Chilean Nitrate Sales Corp.* v. *Alabama*, 288 U.S. 218; *Cooney* v. *Mountain States Tel. & Tel. Co., infra; Fisher's Blend Station* v. *State Tax Commission*, 297 U.S. 650; *Sprout* v. *South Bend*, 277 U.S. 163.

> state and interstate commerce, *the exaction in order to be valid must be imposed solely on account of the intrastate business without enhancement because of the interstate business done and it must appear that one engaged exclusively in interstate business would not be subject to the imposition and that the taxpayer could discontinue the intrastate business without withdrawing also from the interstate business.*"

This same doctrine was applied in *Cooney* v. *Mountain States Tel. & Tel. Co.*, 294 U.S. 384, which was relied upon by the court below; and the test laid down was applied, point by point, to the facts of this case.

East Ohio was a public utility furnishing natural gas locally in more than fifty municipalities in the state. As a part of its business, East Ohio transported gas into Ohio from West Virginia and Pennsylvania. The Court described with great particularity the business conducted by East Ohio Gas Company in Ohio. It pointed out (283 U.S. 470-71) that the interstate transportation and sale of gas from wells outside of Ohio to the connection with local distributing systems was "essentially national—not local—in character and is interstate commerce within as well as without that state." However, while the transportation of some gas was interstate commerce, the company also was engaged, in a very substantial way, in furnishing gas to consumers at retail by means of local distribution plants which it operated. Therefore the Court said that the distribution and sale of "relatively tiny streams" of gas to the ultimate consumer through small, house-to-house supply mains by the East Ohio company was an intrastate

business of purely local concern for which the state could exact a privilege fee.[9]

The tax involved here does not meet the tests laid down by the Court in the *East Ohio* case. Since respondent is not a retailer engaged in local distribution as was East Ohio Gas Company, and since its intrastate business is severable from the interstate business and minor in character, there is no substantial local activity to form a basis for including gross receipts from interstate sales in the measure of the privilege.

Notwithstanding the three-factor formula used, the tax here in question varies directly according to the size of the interstate receipts factor. Thus, the record shows that the inclusion of one-half of the gross receipts from interstate sales in Michigan raises the gross receipts factor from 2.1688% (percentage of Michigan intrastate receipts to receipts everywhere) to 19.3769% (percentage of Michigan intrastate receipts plus 50% of receipts from interstate sales made in Michigan to total receipts) (R. 37). This in turn more than doubles the tax, raising it from $9,326.64[10] to $24,539.59 (R. 13). Thus, because of the use of receipts derived from interstate sales, the tax is not

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[9] Respondent here does not engage in any comparable activity. It sells at wholesale, in large volumes, and in interstate commerce. See *Illinois Natural Gas Co.* v. *Central Ill. Pub. Serv. Co.* and *Missouri ex rel. Barrett* v. *Kansas Natural Gas Co.*, *supra*.

[10] This figure does not appear in the record, but is apparent from other facts in the record. The record shows that the property percentage is 5.0304% and the payroll percentage is 3.3512%; and when these are averaged with 2.1688%, the result is 3.5168%. When this percentage is applied to total capital and surplus and multiplied by 4 mills, the result is the figure used.

"imposed solely on account of the intrastate business without enhancement because of the interstate business done." By the same token, under the statute, the tax apparently could not be avoided by respondent if it discontinued the small intrastate business it does. It could withdraw from the intrastate business without discontinuing its interstate business, as the courts below found (App. 5a, R. 58), but the tax would still be imposed. This fact makes it clear that as applied to respondent, the tax is on the "privilege" of engaging in its interstate business.

The principles stated in the *East Ohio* case as determining the validity of a franchise or privilege tax as it is related to doing business in interstate commerce were reaffirmed in *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157, 168, in which this Court held that the Texas tax on the privilege of gathering gas was unconstitutional because the incidence of the tax was upon "interstate commerce itself." As applied, the tax was upon the taking of gas into the interstate pipeline from gatherers—the loading of the line.[11] The Court said (347 U.S. 170):

> "Here it is perhaps sufficient that the privilege taxed, namely the taking of the gas, is not so separate and distinct from interstate transportation as to support the tax. But additional objection is present if the tax be upheld. It would

[11] There is no difference between the loading and the unloading. See the *Barrett* case, *supra*. Cases upholding franchise taxes on activities related to interstate commerce where the taxpayer does both an intrastate and an interstate business are cited by the petitioner. However, as this Court said in the *Calvert* case, citing a number of these authorities, "* * * these cases are distinguishable * * * in that in each of them the tax was imposed on a less integral part of the commerce process involved" (347 U.S. at 169, N. 7). "The separation must be realistic" (*ibid* in text).

> 'permit a multiple burden upon that commerce' * * * for *if Texas may impose this 'first taking' tax measured by the total volume of gas so taken, then Michigan and the other recipient states have at least equal right to tax the first taking or 'unloading' from the pipeline of the same gas when it arrives for distribution.* Oklahoma might then seek to tax the first taking of the gas as it crossed into that State. The net effect would be substantially to resurrect the customs barriers which the Commerce Clause was designed to eliminate. 'The very purpose of the Commerce Clause was to create an area of free trade among the several States. That clause vested the power of taxing a transaction forming an unbroken process of interstate commerce in the Congress, not in the States.' "

Petitioners have not only completely ignored the rules stated in the cases previously cited, but also the principle, mentioned in the *Calvert* case, that an allocation formula which permits multiple taxation of interstate commerce is invalid. The other states through which respondent's lines run are not bound to use any particular formula. If Michigan may utilize 50% of respondent's gross receipts from interstate business in an allocation formula, on the basis of the sale and delivery of gas in Michigan, the state of Texas should be entitled to use 50% or 100% of respondent's receipts on the basis of the production and gathering of the same gas in Texas as a measure of the privilege of doing business in Texas. In addition, Kansas, Oklahoma, Indiana, Illinois, Missouri, and Ohio, because of local activities, might also tax respondent under a conventional method of apportionment, on the basis of the miles of pipe in each state or upon the volumes of gas transported or upon the gross receipts derived from the volumes of gas transported through each.

The gas which is sold is purchased or produced, gathered, and transported through other states at great cost before being sold in Michigan. Only 7% of respondent's pipeline lies in the state of Michigan, and there is no foundation for thinking that the uninterrupted transportation of the gas for the last 7% of its interstate journey warrants the exaction of a tax based on 50% of the gross receipts from such transportation, purchase, and production.

Petitioners apparently assume that because the termination of respondent's interstate business takes place in Michigan, the state has the right to levy a tax based upon that part of the interstate activity which occurs in Michigan. But this is clearly not the case, especially where the tax imposed is a condition to doing the interstate business within the state. This has been the law for many, many years. See *Leloup* v. *Port of Mobile*, 127 U.S. 640. As this Court said in *Railway Express Agency, Inc.* v. *Virginia*, 347 U.S. 359, 367-8:

> "Here the State exacts every receipt from the movement of express in interstate commerce. It makes a portion of gross revenue from 'all receipts earned in this State on business passing through, into or out of this State.' It contends that this obvious burden on interstate commerce is validated by state protection of a localized incident in the course of the business. The three incidents are originating the interstate movement, which requires local pickup of the parcels; terminating the movement, which requires delivery, and movement through the State. If each of these incidents is sufficient warrant for taxing gross revenues from wholly interstate commerce, a concern doing a nation-wide business is vulnerable to a gross revenue tax in every one of the

> forty-eight states. But it is argued that this is permissible, provided the states formulate their burden so as each to burden it proportionately, not encroaching on the other's right to burden. *It is enough to say that we recently have ruled that local incidents such as gathering up or putting down interstate commodities as an integral part of their interstate movement are not adequate grounds for a state license, privilege or occupation tax.*"

In their discussion of several authorities, petitioners state that respondent's authorities "fall somewhat short of laying the precise question at complete rest" (Pet. 14) and that the decision below was "probably not in accord" with a number of other decisions of this Court (Pet. 16).[12] These decisions are cited without any distinction between the imposition of a franchise or other privilege tax on the business of transporting commodities in interstate commerce and a similar imposition upon a more localized business. Virtually all of them involved taxes upon corporations which engaged in a substantial intrastate or local activity such as manufacturing or selling, and it was the privilege of engaging in this local activity that was taxed.[13] The receipts from interstate commerce

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[12] Petitioners (Pet. 16, N. 15) do not claim that these cases control "singly or in the aggregate." No attempt is made to explain how the decision below conflicts with any or all of these cases; and in fact no such explanation could be offered.

[13] *Baltic Mining Company; Underwood Typewriter; Hump Hairpin; International Shoe; Western Cartridge; Ford Motor Company; Wood Preserving; Western Livestock;* and *International Harvester* all involved manufacturing or similar localized activities on which the taxes in question were levied. Where interstate receipts were used in determining the tax, they were the end product

involved, and which were apportioned for tax purposes, were the end product of a purely intrastate manufacturing or related activity and arose from the shipment of merchandise manufactured, produced, or acquired within the taxing state to points outside the taxing state or sales by a separate sales organization of the taxpayer.

International Harvester Co. v. *Evatt*, 329 U.S. 416, illustrates well the nature of all of the cases cited. There this Court had before it an excise or franchise tax upon the privilege of carrying on business within the state. International owned and operated two large factories in Ohio and four branch selling establishments associated with four warehouses and fourteen retail stores, all located in Ohio. The tax was prescribed on the basis of a complicated formula, which included, among other things, proceeds from the sale of goods manufactured outside of the state but sold in Ohio by Ohio branches of the taxpayer to customers in Ohio. As to these sales, this Court said, 329 U.S. at 421,

> "The Ohio sales agencies' business and their sales to Ohio customers were *intrastate activities.*"

Also, this case involved the imposition of the franchise tax upon the manufacturing business done in Ohio. This Court said that the tax was

> "* * * assessed only against the privilege of doing local Ohio business of manufacturing and

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of a purely intrastate or local activity. *Butler Bros.* v. *McColgan*, 315 U.S. 501, cited in the petition, does not involve the Commerce Clause. *Matson Navigation Co.* v. *State Board of Equalization*, 297 U.S. 441, is also not germane. *East Ohio Gas Co.* v. *Tax Commission of Ohio, supra*, clearly supports the decision below.

> selling * * * the privilege of operating factories and sales agencies in Ohio" (329 U.S. at 423). "The fact that it [the state] chose to measure the amount of such a tax by the value of the goods the factory has produced * * * does not transform the tax on manufacturers to something else" (329 U.S. at 420).

It is submitted that the decision below is not in conflict with any applicable decisions of this Court. It is simply a valid and logical application to the facts of this case of well-established principles.

Although no new or substantial question is presented, petitioners ask review on the ground that the decision below seriously impairs the Michigan revenue. They imply, almost, that it wrecks the entire Michigan tax structure and may adversely affect other states (Pet. 17, *et seq.*, App. D).

Petitioners' statements as to the effect of the decision on the state's tax structure are made without any effort to relate the claimed effect to the facts and the specific holding of the Supreme Court of Michigan. The unsupported assertions as to the loss of revenue to the state of Michigan (Pet. 17 *et seq.*) are apparently predicated upon the assumptions (1) that as a result of the decision below, the §5 formula prescribed in the statute involved is "legally dead" (Pet. 13) as to all taxpayers, and (2) that no reasonable assessments could be made under §5e, as provided for by the Michigan legislature and directed by the court below. There is no basis for any such assumptions.

In the first place, the facts underlying the decision below would furnish little or no precedent for other

taxpayers. Each taxpayer is required to demonstrate the inapplicability of the §5 formula to it. *Norton Co.* v. *Dept. of Revenue*, 340 U.S. 534. The facts as to respondent's business in Michigan are clearly inapplicable to most businesses. Only one other natural gas pipeline served Michigan in 1952 (R. 39). A showing such as that made by this respondent, particularly with respect to the fact that its interstate receipts were not connected with any intrastate or local activity, might be very difficult in most instances. Petitioners should not be accorded a review by this Court of a decision involving sound application of settled legal principles on the ground of unsupported and highly questionable estimates of unknown persons that substantial losses of revenue might result.

The assertion (Pet. 19) that the decision below "might tend to weaken" the tax structures of other states having corporate franchise taxes that employ apportionment formulae has even less support. In Appendix D, petitioners cite a number of state statutes. A similar list of citations was included in the brief before the court below. As we said there, it seems clear, without argument, that these citations could have no significance unless accompanied by an adequate showing as to how the statutes are applied by the taxing authorities of those states, how they are construed by the respective state courts, whether they have ever been challenged under the Commerce Clause of the United States Constitution, and, if so, the facts involved and the decisions reached.

CONCLUSION

WHEREFORE, respondent submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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